

FILE COPY.

No. 11, ORIGINAL.

IN THE



Supreme Court of the United States,

OCTOBER TERM, 1905.

IN EQUITY.

THE STATE OF LOUISIANA, *Complainant,*

vs.

THE STATE OF MISSISSIPPI, *Defendant.*

PETITION FOR REHEARING.

HANNIS TAYLOR,
MONROE McCLURG,
Of Counsel.

WILLIAM WILLIAMS,
Attorney-General of Miss.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

IN EQUITY.

No. 11, Original.

THE STATE OF LOUISIANA, *Complainant,*

v.

THE STATE OF MISSISSIPPI, *Defendant.*

PETITION FOR REHEARING.

The said Defendant comes now and respectfully petitions this Honorable Court for a rehearing of said cause for the following reasons, to wit:

I.

Because the Court erred in holding that the Defendant has lost her constitutional right to assert what she claims to be the true boundary in question by reason of a supposed *acquiescence* upon her part *during a long period of years* in a particular boundary supposed to have been defined and asserted during that period by Complainant. With the greatest respect we will undertake to demonstrate that no question of acquiescence, as that doctrine is defined by law, is presented in this case either by the pleadings

or proof. The specific and only declared purpose of the bill as defined in its prayer is the "practical location" of a boundary line running its entire length through certain waters, and "commencing at the most southern junction of the eastern mouth of Pearl River with Lake Borgne, thence by a deep water channel through Lake Borgne, north of Half Moon Island through Mississippi sound, north of Isle à Pitre, through Cat Island Pass channel, southwest of Cat Island, through Chandeleur Island sound, northeast of the Chandeleur Islands, to the Gulf of Mexico, as is indicated on the original map submitted by the Louisiana Boundary Commission to the Mississippi Boundary Commission and now made part of this bill, marked Exhibit E." There is no pretense in the bill that such a line has ever had a "*practical location*"; the primary purpose of the bill is to give it a "practical location" by having it "permanently buoyed at the joint expense of both States." Complainant does not claim that any one ever heard of such a line until it was first suggested as a practical expedient for settling the controversy between the States by a civil engineer, Mr. W. C. Hodgkins, in a report made by him on the subject January 30, 1901. See Record, pp. 999-1003. The Court will there find the following: "Department of Commerce and Labor, Washington, D. C., March 18, 1904. I hereby certify that the annexed is a true copy of the original report of January 30, 1901, and the accompanying sketches, submitted by Mr. W. C. Hodgkins, assistant, Coast and Geodetic Survey, on the boundary line between the States of Mississippi and Louisiana in the waters bordering upon

the Gulf of Mexico. Andrew Braid, assistant in charge of office of Coast and Geodetic Survey." Then follows four printed pages in which Mr. Hodgkins, after demonstrating that it is practically impossible for anybody to say where the boundary in question is located, concludes as follows: "From all the information at hand, therefore, *it would appear* that the boundary between the States *probably takes the course indicated on the final tracing*, i. e., north of the Malheureux Islands, and thence through the Cat Island channel to the Gulf of Mexico." The Court is mistaken in supposing (p. 29) that Hodgkins ever pretended to know where the boundary actually *is*; he only undertook to make a guarded statement as to a *probability*. Never until his report was made in January, 1901, did any one ever hear of this line, the invention of Mr. Hodgkins, *in which the State of Mississippi is now supposed to have acquiesced during a very long period of years*. The line as thus invented and proposed by Mr. Hodgkins was at once seized upon by the Louisiana Boundary Commission, which submitted it, at a conference held in the city of New Orleans, March 26, 1901, to the Mississippi Boundary Commission *as Louisiana's claim* as to what the boundary line between the States should be. As the record shows, p. 25, that claim was defined at the conference in question upon the identical map, Exhibit E, now annexed to the bill of complaint. From the minutes of the conference the following appears: "This view of the matter having been presented a general discussion followed during which the members of the Mississippi Boundary Commission admitted that the view was *a novel*

one to them, they being unable to pass upon it at the moment and requesting further time." After reflection the Mississippi Boundary Commission replied to the Louisiana Boundary Commission as follows: "The difference between the line marked by your honorable body [that is, the Hodgkins line] and that which we conceive is the true boundary is so great that we have no hope of being able to reconcile them, and therefore deem it useless to submit any counter line or proposition. The Mississippi Commission considers as islands considerable territory which the Louisiana Commission claim as mainland, and the difference over this question of fact appears to us to be past reconciling." See Record, pp. 24-26. It thus appears *from documents exhibited by Complainant* that on the first and only occasion that the proposed boundary line, *and the only boundary line in question in this case*, was ever submitted to the State of Mississippi or to any of her citizens, it was received as "a novel" thing of which they had never heard, and rejected as a proposition not debateable. It is therefore certain that if there has ever been any acquiescence upon the part of either State in a boundary line it has taken place since January 30, 1901 (the bill was filed in October, 1902), when Mr. Hodgkins attempted to indicate what it "probably" should be. There is no pretense in the pleadings or evidence that prior to his tracings any one had ever attempted to indicate even upon a map the position of said line, much less to give it "practical location." It is elementary and fundamental that the doctrine of acquiescence can never be applied for the purpose of estab-

lishing a boundary that has never had "practical location" by being actually marked and established by some kind of visible physical monuments, because, in the language of the books, there must be "an acquiescence *in such a line* for a time long enough to bar a right of entry under the statute of limitations." See Am. and Eng. Enc. of Law, Vol. 4, pp. 863-64, and authorities cited. That great array of cases recognizes throughout that there must be *an actual marking or designation of the line on the territory over which it extends by visible physical means*, before either party can be held to have accepted it by acquiescence, because acquiescence implies an *active assent* to a known and visible line. In drawing the distinction between laches and acquiescence a distinguished author says: "While the words laches and acquiescence are often used as similar in meaning the distinction in their import is both great and important. Laches imports a merely *passive*, while acquiescence implies *active assent*." Wood on Limitations, § 62. It is impossible for men or States to accept or acquiesce in a given line as a boundary without knowing where it is. Unless it has had, as all the authorities assert, a "practical location," a "marking upon the ground," the doctrine of acquiescence can not be employed as a means of confirming it. That universally accepted principle is the basis of the judgment of this Court in *Indiana v. Kentucky*, 136 U. S. 479, in which the claim of Kentucky was sustained because Indiana had acquiesced, during a long period of time, in a boundary line asserted by Kentucky and definitely marked on the earth. In the words of the Court: "Our conclusion

is, that the waters of the Ohio River, when Kentucky became a State, flowed in a channel north of the track known as Green River Island, and that the jurisdiction of Kentucky at that time extended, and ever since has extended, to what was then low-water mark on the north side of that channel, *and the boundary between Kentucky and Indiana must run on that line, as nearly as it can now be ascertained, after the channel has been filled.*" The conclusion thus reached was that for seventy years Indiana had acquiesced *in a definite line marked upon the earth* by natural monuments which all the world could see and understand, and "the boundary between Kentucky and Indiana must run on that line," etc. In *Virginia v. Tennessee*, 148 U. S. 503, 528, in which the foregoing case is quoted, this Court has said: "Independently of any effect due to the compact as such, a boundary line between states or provinces, as between private persons, *which has been run out, located, and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years*, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant, and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary. Lord Hardwick, in *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, 448; *Boyd v. Graves*, 4 Wheat. 513; *Rhode Island v. Massachusetts*, 12 Pet. 657, 734; *United States v. Stone*, 2 Wall. 525, 537; *Kellogg v. Smith*, 7 Cush. 375, 382; *Chenery v. Waltham*, 8 Cush. 327; Hunt, *Boundaries* (3d ed.) 306." *Boyd's Lessee v. Graves* was the case of an agreement, by parol, between two proprietors

of adjoining lands to employ a surveyor to run the dividing line between them, and that it should be thus ascertained and settled, which was executed *and the line accordingly run and marked on a plat by the surveyor, in their presence, as the boundary.* On that state of facts this Court declared that "*The possession subsequently held, and the acts of the parties evidenced by their respective sales of parcels of the land held by each, under his patent, bounding on the agreed line, amount to a full and complete recognition of it.*" In *Rhode Island v. Massachusetts*, p. 733, this Court thus stated the precise issue: "One asking us to annul, the other to enforce the agreements; one averring continual claim, the other setting up the quiet, unmolested possession for more than a century, *in strict conformity to, and by the line in the agreements.* * * * *The locality of that line is matter of fact,* and, when ascertained, separates the territory of one from the other, for neither State can have any right beyond its territorial boundary." In applying the doctrine of acquiescence in *Stone v. United States*, this Court said: "This survey was made in the presence of the agent of the Delawares. It marked the usual quantity of about three miles square, as appurtenant to the post and necessary for its use and subsistence, making the lines thereof the boundary of the grant to the Delawares, with the concurrence and consent of the agent of the nation. *It was made in the year 1830, and since that time both parties have held possession and claimed up to the lines then established by the survey.*" No case can be found in which this Court has ever applied the doctrine of acquiescence to a boundary controversy between States or in-

dividuals unless it clearly appeared that a *definite boundary line* had first "been run out, located, and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years." For that reason it is impossible to apply the doctrine to the settlement of the boundary in question here. *The affirmative case* made upon the face of the bill precludes the possibility of such a thing because it appears from the bill that the line in question was never invented until January 30, 1901, and that when it was presented for the first and only time to the representatives of Mississippi they received it as "a novel" thing of which they had never heard before, and rejected it as unworthy of discussion. The bill does not claim that prior to the Hodgkins invention anybody had ever attempted to define the line in question and Mr. Hodgkins himself admits that the subject was so difficult that he could only attempt to say that the line "probably takes the course indicated." Because the line has never had "practical location" the bill was filed with that end in view. In the face of the facts as thus presented by Complainant's pleadings and proof how can it be held that *Mississippi acquiesced during a long period of time in a line never proposed until 1901*, never given "practical location" at any time, and rejected by her as a novel thing unworthy of consideration on the only occasion upon which it was ever presented for her assent. We respectfully submit that the application to the facts of this case of the doctrine of acquiescence in the face of the admissions by Complainant that she has never asserted any definite boundary line through the land and water area in question, that she

never even claimed *such a line on paper* until March, 1901 ; that such a line has never been given "practical location" by being marked on the earth or buoyed on the water,—overturns every previous definition of the doctrine of acquiescence heretofore made by this Court. Our contention is that this part of the judgment is abstract because neither the pleadings nor proof present conditions to which the doctrine in question can possibly be applied.

It is true that the record contains a mass of conflicting testimony offered by each State to prove the assertion upon its part of sovereignty and jurisdiction over portions of the area in dispute during a long period of time. If that mass of conflicting testimony is to have any legal effect at all it must be considered simply as proof of *prescription*, a doctrine which can not be confused with the doctrine of acquiescence, as they rest upon entirely distinct foundations. As we have demonstrated already the doctrine of acquiescence can never be invoked except as a means of confirming a boundary definitely marked off and defined by physical monuments, *prior to the beginning of the acts of acquiescence*. As that doctrine can not be applied here, the only remaining question is this: Has Louisiana established a title to this vast area, occupied in the main by water, through prescription, as that doctrine is defined in the law of nations, which has never attempted to say how long the quiet and adverse possession must continue in order to vest title? This Court has never indicated that it is possible for any State of this Union to gain territory from another State upon any such basis. Even if such a principle existed there never was a case in which there

could be less justification for its application, as there is no proof of the exercise of any visible and actual possession upon the part of either State over a domain without a single human habitation. We confidently contend that so far as constructive possession is concerned the weight of the testimony is decidedly in favor of Mississippi. So far as the water territory is concerned, through which the bill proposes to run the Hodgkins line, the proof clearly shows that it has been in the unmolested enjoyment of thousands of Mississippi fishermen for more than fifty years. It may be stated with certainty that at least sixty out of the seventy-seven witnesses called by Mississippi sustain that statement, including governors, judges, district attorneys, sheriffs, clerks, mayors, justices of the peace, and all classes of citizens along the coast from capitalists down to the poorest tong-men. We do not know how seriously to discuss the proposition that, upon the vague and conflicting proof as to constructive possession of the territory in question, Louisiana has title by prescription. We do not believe the Court intends even to consider such a proposition. In its opinion it has made no intimation that it intends to apply *the doctrine of prescription*. It is evident, however, that the result of the proof as to *prescription* has induced it erroneously to conclude that there has been *acquiescence* upon the part of Mississippi. As an illustration.—The Court says (p. 30): "The record contains much evidence of the exercise by Louisiana of jurisdiction over the territory in dispute, and of the general recognition of it by Mississippi as belonging to Louisiana." Even if that is granted such proof can only be considered as proof of *prescription* for the

simple and conclusive reason that as no definite boundary was ever defined or marked the doctrine of acquiescence is not involved. In reaching the conclusion that Mississippi has, during a long period of years, actually and affirmatively acquiesced in a definite boundary clearly marked and asserted by Louisiana *before the supposed acts of acquiescence began*, the actual condition of the record has evidently been lost sight of, the bill failing to allege or the proof to show that Louisiana ever claimed or asserted a definite line through the region in question prior to 1901. It is therefore impossible that Mississippi could have acquiesced during a long period of time in a line never even traced on a map, much less given a "practical location." We pray that the Court will re-hear us so that we may remove the manifest misapprehension as to the facts involved in this branch of the case.

II.

Because that part of the judgment which applies the doctrine of the thalweg or mid-channel to the waters of Mississippi sound upon the theory that such waters are *territorial waters*, and not the open sea as declared by the Department of State, whose rule on that subject the Court must follow, is based largely upon *an erroneous conclusion of law as to the character of such waters*, contained in the cross-bill of Defendant, and quoted by the Court in its opinion at p. 26. The erroneous conclusion of law thus embodied in the cross-bill early in the litigation was not subsequently removed by amendment because as the legal character and situation of the waters of Mississippi sound, a prominent feature in the geography of the country, are

a part of the Court's judicial knowledge, such knowledge is so conclusive as to be entirely unaffected by any contrary averment of the pleader or by any conflicting evidence that might be offered on the subject. Am. Enc. of Law, Vol. 17, pp. 902-3, and authorities cited. And even if the matter in question were not a subject of judicial knowledge, certainly no erroneous conclusion of a pleader as to a well-settled rule of international law can convert a part of the open sea into that kind of territorial water technically known as "an arm of the sea." It is an elementary rule of pleading, at law and in equity, that "A party is not concluded by an erroneous averment of law in his pleadings. The rule of estoppel by averment of a fact has no force as to a statement of the law to be applied to a certain state of facts. *A mistaken assumption of what the law is* will not be presumed to have misled the opposite party." 39 Am. Dig. Cent. ed. 1203; *Union Bk. v. Bush*, 36 N. Y. 631; Bac. Abr. "Pleas," 322. We therefore respectfully contend that the Court must settle upon its merits, and in the light of its judicial knowledge, the vital question involved in this case, which is this: Are the waters to which the Court proposes to apply the doctrine of the thalweg or mid-channel as now defined by it *territorial waters of the United States* or a part of the open sea? We bow to the judgment of the Court that the doctrine of the mid-channel may be lawfully extended beyond rivers to "an arm of the sea" dividing States from each other. It is axiomatic and elementary that "an arm of the sea" is necessarily *territorial water*, water so inclosed between headlands or promontories as to fence or mark it off from the open sea. The moment such

a body of water ceases to be *territorial* that moment it ceases to be what is technically known as "an arm of the sea." No publicist, no theorist, no advocate, either here or elsewhere, has ever ventured to claim that the doctrine of the thalweg can be applied to the waters of the open sea as contradistinguished from the territorial waters embraced in what is known as "an arm of the sea."

Our respectful and earnest contention now is, (1) that only the political department of this Government can determine what are the territorial waters of the United States; (2) that the judicial department must follow the rule of the executive in that respect; (3) that the waters of Mississippi sound to which the Court now proposes to apply the doctrine of the thalweg, *and which it recognizes as territorial waters*, are declared by the Department of State to be the open sea and as such beyond the territorial limits of the United States. If we are correct in that contention, now presented for the first time in that aspect, it is a contradiction in terms to speak of the Court defining a boundary beyond the limits of territorial waters, for the simple and conclusive reason that the jurisdiction of the Court ends at the point where the open sea begins. In order to present this view of the case more vividly to the Court we will quote from the prayer of the bill: "And after due proceedings may it please your honors to adjudge and decree that the boundary line dividing the States of Louisiana and Mississippi, in the waters between the said States to the south of the State of Mississippi, and to the southeast of the State of Louisiana is the deep water channel, commencing at the most southern junction of the eastern mouth of Pearl River

with Lake Borgne, thence by the deep water channel through Lake Borgne, north of Half Moon Island through Mississippi sound, north of Isle à Pitre, through Cat Island Pass channel, southwest of Cat Island, through Chandeleur Island sound, *northeast of the Chandeleur Islands to the Gulf of Mexico*, as is delineated on the original map submitted by the Louisiana Boundary Commission to the Mississippi Boundary Commission and now made part of this bill marked Exhibit E; that the said deep water channel be located throughout its course and permanently buoyed at the joint expense of the two States; *that the State of Mississippi and its citizens be perpetually enjoined from disputing the sovereignty and ownership of the State of Louisiana in the said land and water territory north and west of said boundary line.*" If the Court will examine the red line on said map marked Exhibit E (printed in the record opposite page 8) which defines exactly the area of territorial water claimed by Louisiana, and which she prays the Court to decree to her by virtue of the so-called deep water channel theory, it will see that her claim is extended to a point southeast of Breton Island, which point is located in the open waters of the Gulf of Mexico, certainly *eighty miles from the southern coast of Mississippi and about forty-five miles from the mainland coast of Louisiana.* The prayer is "that the State of Mississippi and its citizens be perpetually enjoined from disputing the sovereignty and ownership of the State of Louisiana *in the said land and water territory north and west of said boundary line.*" Thus the startling claim is made by Louisiana to the entire group of the Chandeleur Islands, now owned and occupied by the United States and situated nearly if not quite twenty-five miles from her

eastern coast as defined by this Court, with all the vast expanse of waters embraced within a line sweeping around to the east of said group. If the prayer of the bill is granted the result will be that an area of the open waters of the Gulf of Mexico, *at least fourteen hundred square miles in extent*, which, under the settled rule of our Department of State constitutes the ocean, the property of all mankind, will be fenced off and inclosed as a part of the territory of Louisiana. There can be no possible mistake as to the extent of the claim as the specific prayer of the bill is that "the said *land and water territory* south and west of said boundary line" be decreed to the State of Louisiana. If the Court will follow the proposed boundary as defined by the red line marked on the map in question, it will see that it sweeps to the east of the Chandeleur group and Breton Island, thence around the mouths of the Mississippi and along the southern coast of the State to the mouth of the Sabine River. A State boundary must of necessity be *continuous*; it can not break off in mid-ocean and disappear. The bill does not attempt to avoid that issue; the continuous line is boldly drawn to the east of the Chandeleur group, and this Court is asked to decree that all of the waters west of that line up to the eastern shore of Louisiana be decreed to that State *as territorial waters*, including of course the Chandeleur Islands and Breton Island. If the deep-water channel theory is to prevail Louisiana can claim no less because only in that way can she set up a continuous boundary. If the Court sustains this claim and decrees that all waters to the south and west of the red line as defined on the map in question are the territorial waters of

Louisiana what will be the effect on the territorial limits of the United States? The answer is easy. According to the elementary rule of international law the outer edge of the territorial waters of Louisiana must be fringed by the marine league, whose outer edge marks the beginning of the open sea. Thus the southern maritime boundary of the United States in those waters will, *by a decree of this Court*, be extended into the open waters of the Gulf of Mexico many miles to the south and east of the national boundary line as now fixed and recognized by the political department. In a word a vast expanse of water which that department now recognizes as the open sea, upon which hostile fleets may encounter outside of our national boundaries, will be converted into territorial waters of Louisiana. We respectfully urge that there should be further discussion and consideration of this vitally important aspect of the case, for two reasons: first, because of the inevitable conflict that must arise between the judicial and political departments of the Government as to the national boundaries in the waters in question if the draft of the final decree now offered is enrolled; second, because the question of the exclusive right of the political department to determine what are and what are not the territorial waters of the United States has not heretofore been discussed in any form by counsel on either side of this case. Our excuse, if one be needed, for a failure to go into that subject heretofore is that we confidently believed that the Court would hold that the doctrine of the *thalweg* could not be extended beyond rivers to that kind of territorial water technically designated as "an arm of the sea." After the intimations made on that subject during

the oral argument we did not suppose that the doctrine of the mid-channel would receive serious consideration.

The right to fix national boundaries necessarily carries with it the right to define what are and what are not territorial waters. The political department possesses the exclusive right to make such definitions, which must be accepted as final by the judiciary. Peaceful intercourse between nations requires that each State should define its boundaries by land and sea. Under our Constitution national boundaries are defined by political and not by judicial action, and the courts follow the decision of that department of government which makes the definition. Hence the formula that the "Judiciary takes executive view as to national boundaries." Wharton, Int. Law. Dig. Vol. I, § 22, citing *Foster v. Neilson*, 2 Pet. 253; *Garcia v. Lee*, 12 *id.* 511; *Williams v. Suffolk Ins. Co.* 13 *id.* 415; *U. S. v. Reynes*, 9 How. 127. No State can possibly define its boundaries without determining what are its territorial waters as contradistinguished from the waters of the open sea, because only in that way can the place of the maritime league be fixed. International law therefore concedes to each State the right to define within certain limits its territorial waters. In the exercise of that right our Department of State has followed two distinct policies. The earlier policy has been thus defined by Kent: "Considering the great extent of the line of the American coasts, we have a right to claim for fiscal and defensive regulations a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume for domestic purposes connected with our safety and welfare the control of waters on our coasts, though included within

lines stretching from quite distant headlands,—as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the South Cape of Florida to the Mississippi." Comm. I, 30. As such extravagant claims were in conflict with the principles of modern international law they were abandoned at an early day in favor of the generally accepted rule as thus stated by Hall: "In any case the custom of regarding a line three miles from land as defining the boundary of marginal territorial waters is so far fixed that a State must be supposed to accept it in the absence of express notice that a larger extent is claimed." p. 160. We have only claimed "a larger extent" in the case of certain land-locked bays inclosed within headlands. The following is an accurate and complete statement of the rule of our Department of State as recognized for more than half a century:—"The position of this Department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from low-water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt. *This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely at a distance of three miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign.*" Mr. Bayard, Sec. of State, to Mr. Manning, Sec. of Treasury, May 28, 1886; Wharton, Int. Law Dig. Vol. I, § 32. Under that rule it is impossible to run any

line from headland to headland so as to make the open waters of Mississippi sound to which the mid-channel doctrine has been applied *territorial water*. If the extremity of the Isle à Pitre should be taken as one headland it would be necessary to reach over the vast expanse of water between that point and Alabama port at the mouth of Mobile Bay before anything even resembling another headland could be found. Such a rule, as once stated by Kent, has been a dead and repudiated doctrine for more than sixty years. *The United States now claims no indentations of its coast such as Mississippi sound as territorial waters.* The fact that a few islands miles from the shore are situated in front of such an indentation can not possibly convert it into an arm of the sea. *No such principle is recognized either by our Department of State or by international law.* A territorial character is given only to such *interior waters* as Delaware and Chesapeake Bays, Mobile Bay and Lake Pontchartrain, which are really "included by promontories or headlands within its territories." See Moore, Int. Arb. Vol. I, 744; Lawrence's Wheaton, 2d ed. p. 320. It was so manifest, so uncontrovertible, under the existing rule of our State Department, that such an indentation in the coast as Mississippi sound (uninclosed by anything that can by possibility be called "promontories or headlands") is *the open sea*, and not territorial water, that counsel for Louisiana urgently insisted upon that fact, until they perceived its crushing effect upon the thalweg theory. In their original brief they say: "As a matter of fact the waters of Mississippi sound were considered as the sea or as forming part of the sea and Gulf of Mexico at that time. We have already

shown (p. 69) that Mississippi sound and Lake Borgne are salt-water bodies of water *and true parts of the sea or gulf*. Congress in its description so regarded these bodies of water, for in its boundary description it carried its line from the middle of Lakes Maurepas and Pontchartrain *immediately* [the italics are theirs] to the Gulf of Mexico, thus indicating that it considered that to be the next body of water to be reached in the extension of the southern boundary of Louisiana around to the westward until it reached the Texas line." An amplification of that sound and unanswerable statement of the law as laid down by our State Department is to be found on p. 69, where the following occurs: "The meaning of the word 'sea' in the treaty of peace of 1783, between the United States and Great Britain defining the boundaries of the United States, was given by the American claim, and acquiesced in by the British as follows: 'The term "sea" in its general sense embraced the whole body of salt waters. Its great subdivisions were designated by the names Atlantic Ocean, Pacific Ocean, etc. *Each of them generically embraced all the bays, gulfs and inlets formed by the indentures of its shores or by adjacent islands.*' (Moore's International Arbitration, Vol. I, p. 102); and the Bay of Fundy, the Gulf of St. Lawrence and the Bay of Chaleurs were considered parts of the sea (*ibid.* pp. 114, 158, and note 3)." No criticism can be sharp enough to destroy that definition of the open sea as contradistinguished from territorial waters, a definition through which counsel for Complainant triumphantly declare "that Mississippi sound and Lake Borgne are salt-water bodies of water, *and true parts of the sea or gulf.*" And yet in the face of that admission, deliberately made

by Complainant's counsel and supported by unanswerable authorities, the Court says (p. 24): "Mississippi's mainland borders on Mississippi sound. This is an enclosed arm of the sea, wholly within the United States, and formed by a chain of large islands, extending westward from Mobile, Alabama, to Cat Island." We earnestly insist that that view is a manifest error because it conflicts sharply with the rule of our State Department which declares Mississippi sound *and all like indentations of the coast* to be open sea and not territorial water. If the Court holds to the view it has expressed in this regard the result must be a clearly defined conflict between the judicial and political departments as to a subject *within the exclusive domain of the latter*. The State Department can not bow to the new rule as thus announced by the Court without an abandonment of the entire basis upon which the character of the territorial waters of the United States is now determined. If, as counsel for Louisiana contend, and as we contend, Mississippi sound is a part of the open sea, then it follows as the night the day that the doctrine of the *thalweg* can not be extended to the waters of Mississippi sound, because no publicist, no theorist, no advocate ever has ventured to suggest that *that doctrine can be applied to the waters of the open sea*. The extreme claim is that it may be extended beyond rivers to "an arm of the sea," that is to a body of *territorial water* so cut off from the main body of the sea as to be within the limits of one or more States, a body of water with banks like a river. It is axiomatic that "an arm of the sea" must be territorial water for the conclusive reason that the moment it ceases to be such it becomes a part of the open sea

itself. Counsel for Louisiana have only asked the Court so to enlarge the doctrine of the *thalweg* as to permit its application to that kind of *territorial water* between two States which is known as "an arm of the sea." And in this they have been perfectly consistent because their bill alleges and its prayer states *that every portion of the water through which the Court is asked to extend the mid-channel is territorial water.* The prayer is that Louisiana be decreed "the said land and *water territory* south and west of said boundary line." Her counsel perfectly understand that even in the enlarged form in which this Court has accepted the mid-channel doctrine it dies the moment it passes the limits of territorial waters ; it can not be applied to the open sea. Therefore the solution of this part of the case is perfectly simple the moment that the fact is accepted that the only territorial waters in the United States are those recognized by the political department of the government as such, *and that Mississippi sound is not so recognized.* There are no mysteries in this problem susceptible as it of exact demonstration. If the Court will fix its eyes upon that *long undulating indentation* in the coast of the Gulf of Mexico known as Mississippi sound, it will see the only waters with which we have to deal in this case because that part of the Gulf known as Lake Borgne ends just at the point where the so-called mid-channel begins. Even if that were not so we have the solemn declaration of Complainant's counsel, never retracted, "that Mississippi sound and Lake Borgne are salt-water bodies of water and true parts of the sea or gulf." But the inquiry need not be extended beyond that section of the Gulf known as Mississippi sound. If that sound is not "an arm of the

sea," if it is not fenced off from the main body of the Gulf by headlands or promontories, if its waters are not territorial waters, then it is the open sea to which, even under the widest possible definition, the doctrine of the mid-channel can not be extended. That is true for a very simple reason. A mid-channel is a channel midway between the banks of a river or the banks or shores of an arm of the sea. The moment banks of every kind disappear, as they do when an attempt is made to apply the doctrine to the open sea, the phrase "mid-channel" loses all meaning, it becomes a mere solecism. No possible ingenuity can construct an argument upon the theory that Mississippi sound is cut off from the main body of the Gulf by promontories or headlands because nothing in their likeness exists. The sound is simply a long indentation of the coast such as our Department of State declares to be the open sea and not territorial water. The only territorial water here is that within the three-mile zone which follows: "closely at a distance of three miles the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign," as Secretary Bayard has so clearly stated it. If the Court will follow on the map the line of the proposed mid-channel it will see that the moment it crosses the three-mile zone annexed to the shore at the mouth of Pearl River, it passes at once beyond the limits of the United States into waters which our Department of State declares to be the open sea, a domain into which the writs of this Court can not run. As an object-lesson let us take the so-called mid-channel at the point at which the bill proposes to extend it "*northeast of the Chandeleur Islands to the Gulf of Mexico, as*

is delineated on the original map," etc. At that point it is distant at least twenty-two miles from the southern coast of Mississippi and at least twenty miles east of the eastern coast of Louisiana as now fixed by this Court, *and last and most of all it is at least seventeen miles beyond the territorial limits of the United States as defined by our Department of State.* Certainly it will be admitted that that part of the waters of the Gulf of Mexico is miles beyond the water area which the Court has called "an enclosed arm of the sea." Even if that view were sound it would not help the matter, *because the proposed mid-channel must run for many miles beyond the limits which the Court gives to Mississippi sound as territorial water.* And yet this Court is seriously asked to run its writs out to that point in the open sea in order "that the State of Mississippi and its citizens be perpetually enjoined from disputing the sovereignty and ownership of the State of Louisiana in the said land and water territory south and west of said boundary line." The enormity of this claim will become still more startling if the Court will fix its eyes upon that great body of water, upon which the navies of the world could assemble, bounded on the west by the eastern coast of Louisiana and on the east by that crescent shaped chain of islands known as the Chandeleur and Errol Islands. Despite the fact that the political department proclaims to all nations that hostile fleets may there encounter outside of the three-mile zone fringing the coast, Louisiana prays that that entire expanse of water be withdrawn from the common use of mankind; that it be made a closed sea within her territorial limits; and "that the State of Mississippi and its citizens be perpetually enjoined

from disputing the sovereignty and ownership of the State of Louisiana in the said land and water territory south and west of said boundary line." If the Court will estimate on the map the superficial area of water "south and west of said boundary line," which Louisiana proposes to appropriate, it will find that such area embraces *at least fourteen hundred square miles of open sea* beyond the national limits of the United States as defined by the political department. If the Court doubts the reality of what seems to be impossible, it has only to read the clear and explicit provisions of the draft of the proposed final decree which Complainant's counsel have already presented for enrollment. Through the terms of that proposed decree Louisiana is asking this Court to confirm to her, *as territorial waters*, every foot south and west of a line to be extended "through the northeast corner of Lake Borgne, north of Half Moon or Grand Island, thence east and south through Mississippi sound, through South pass between Cat Island and Isle à Pitre, through Chandeleur sound, *northeast of the Chandeleur Islands into the Gulf of Mexico*, all as shown on the map Exhibit E made part of Complainant's bill of complaint." On that map the proposed line which is to define the territorial limits of Louisiana is boldly drawn around the entire group known as Chandeleur and Errol Islands, the acknowledged property of the United States, and now in its use and occupation as such. When counsel for Complainant presented to us the proposed draft of a final decree for approval we asked him what would become of the title of the United States to the Chandeleur group after its enrollment. His reply was that the group would

still belong to the United States, *but would be inclosed within the limits of Louisiana.* Within this vast area of open sea which is to be thus inclosed for the exclusive benefit of a single State this Court is asked, by the terms of the proposed draft, perpetually to enjoin the State of Mississippi, "its officers and citizens from disputing the sovereignty and ownership of Louisiana in the said land and water territory." Such a startling and unprecedented claim, which would project the limits of Louisiana out into the ocean many miles beyond the limits of the United States as now fixed, is the necessary corollary of the proposed mid-channel or rather mid-ocean theory. Its reckless extravagance will we believe, in the end, destroy it. Nothing can more pointedly illustrate that extravagance than the proposal to inclose within the territorial limits of Louisiana the Chandeleur Islands, the undisputed property of the United States, now in its use and occupation as a reservation. That group standing apart from the continent in the ocean, and surrounded of course by a three-mile zone of its own, was acquired from France, through the Louisiana Purchase, by the United States, which never pretended to convey it to Louisiana under the act of 1812 admitting her into the Union. On the contrary the Government of the United States expressly reserved the group for its own purposes. And yet without this grotesque contention that the territorial limits of Louisiana shall be so enlarged as to inclose this group, it is impossible to maintain the deep-water channel theory, which can not exist unless such a channel can be extended in its entire course, *Through territorial waters,* "north-east of the Chandeleur Islands to the Gulf of Mexico."

In the light of such a proposal who can fail to see that the dominant and ultimate motive of this suit upon the part of Louisiana, is the appropriation, by the aid of the process of this Court, of a section of the open waters of the Gulf of Mexico one-third larger than the State of Rhode Island, in order that a vast trust or monopoly may be established therein for the exclusive benefit of the individuals and corporations engaged, with millions of capital, in her great and growing fish and oyster industry. As this Court has held in *Smith v. Maryland*, 18 How. 71, that a State can grant to its own citizens exclusive use of lands covered by water, for raising oysters, and may prohibit, under a penalty, their use for such purpose by citizens of other States, Louisiana can quickly complete this vast and unlawful design by legislation of her own, if by the aid of this Court she can succeed in inclosing within her territorial limits the part of the open sea in question. The taking away from Mississippi of the comparatively unimportant islands for which we are now battling is but a small matter to the real promoters of the scheme now laid bare by the presentation of the draft of the proposed final decree. The backbone of course of this unlawful enterprise in the interest of a giant monopoly is the mid-channel theory, without which it can not for a moment exist, as the act of 1812 defining the boundaries of Louisiana contains nothing that can give even color to such a claim. When this Court sternly rebukes as it surely will this unprecedented attempt to pervert its powers to a grossly illegal purpose, *the specific case* as made by the bill will fall to the ground. We earnestly suggest

that when that point is reached, the Court should not proceed in a case of this magnitude to consider what other measure of relief may be granted under the general prayer, without rehearing counsel as to the new questions which will then arise. If the Court adheres to its conclusion (p. 30) "that Complainant is entitled to the relief sought," then it must grant the special prayer of the bill as embodied in the draft of the final decree which proposes to inclose at least fourteen hundred square miles of open sea, including the Chandeleur and Errol Islands, within the territorial limits of Louisiana. In that new aspect of the case the question whether or no Mississippi sound is an arm of the sea becomes comparatively unimportant. The larger question thus presented is this: Can this Court undertake to decree to a single State that vast area of open sea, lying between the Chandeleur and Errol groups and the eastern coast of Louisiana, *as territorial water?* Upon so grave and far-reaching a question, involving the interests of all the Gulf States, as well as large political and property interests of the United States, it would seem that there should be some argument. The Court can neither accept nor reject the proposed draft of a final decree without passing upon that larger question which has not, as yet, been argued at all.

III.

A VITAL PRINCIPLE OVERLOOKED.

If the Court shall graciously grant to us a rehearing upon certain questions in this case we will not attempt

to renew the contention that those parts of the acts of 1812 and 1817 which define the southern and eastern boundaries of the States in question should be construed *in pari materia*. We accept as final that part of the judgment which declares that as the act defining the boundaries of Louisiana is prior in point of time to her must pass every foot of territory which a fair and lawful construction of that act conveys. It can not be claimed that that act is not in the usual form or that it is in any respect incomplete. It is unambiguous on its face and it employs the technical terms by which land and sea boundaries are usually defined. In the light of those facts we renew the vitally important contention, *which seems to have been entirely overlooked by the court*, that a general rule of international law, such as that involved in the doctrine of the mid-channel, can never be applied when the subject matter is regulated by a *special or conventional rule*. As will appear from the following authorities that rule of international law is fundamental: Grotius, *De Jure Belli ac Pacis*, II, C. 3; Bluntschli, XV, 2; Martens, *Precis*, Sec. 119, p. 320; Calvo, *Droit Int.* I, Sec. 19, p. 109; Phillimore, *Int. Law*, I, pp. 44-45 (2d ed. London); Twiss, *Law of Nations*, I, pp. 130-131; Lawrence's Wheat. p. 28; Halleck, *Int. Law*, I (Baker ed.), p. 50; Lorimer, *Ins. of Int. Law*, I, p. 43. The obvious reason of the rule is embodied by Grotius in an illustration directly in point. He says that while in a doubtful case the ownership of territories on either side of a river is determined by the middle of the channel, it may be that the sole right to the entire river may belong to the terri-

tory on one side when for instance "*this sole right may have been so settled by treaty.*" That is to say, when the parties themselves have established a special and conventional rule to regulate the particular case, that special rule can not be abrogated by the general rule of international law that would be applied if the special rule did not exist. When the States entered into the Union it was through a constitutional compact which authorizes Congress to define by special or conventional rules their boundaries. Therefore when such a conventional rule embodied in an act of Congress regulates the particular subject matter, it is impossible to annul it and put it aside by the suggestion that there is a general rule of international law that must supplant it. By invoking the doctrine of the mid-channel in this case Louisiana is simply striving to interpolate into the act defining her boundaries a general rule whose application will entirely change her boundary on the sea as Congress has defined it. From the junction of the Rigolets with Lake Borgne to the mouth of the Sabine River the boundary of Louisiana is the "*coast.*" The vital words of the act are : "including all islands within three leagues of the *coast.*" Congress thus used a technical term perfectly understood in international law which establishes a definite *land boundary* for that State and not a shadowy and uncertain water boundary to be worked out through the application of the general rule embodied in the doctrine of the *thalweg*. If that general rule is applied it simply annihilates the special rule Congress has established by fixing the eastern boundary of Louisiana miles away from the *coast* which Congress declared should be the boundary.

We respectfully submit that the Court falls into a manifest error when it says (p. 20): "The eastern boundary thus described is a *water boundary*, and, in extending this water boundary to the open sea or Gulf of Mexico, we think it included the Rigolets and the deep water sailing channel line to get around to the eastward." Upon the contrary the act expressly declares the eastern boundary to be a *land boundary* which is the "*coast*." There is no allusion in the act to a "sailing channel line"; *there are no words from which it can possibly be inferred*. If the rights of Louisiana rest upon the terms of the act admitting her how can those terms be varied by the injection into the act of a general rule of international law in direct conflict with them? If we can only succeed in drawing the attention of the court to this simple yet vital principle, not adequately presented, we admit, in the original brief, we feel confident that the vexing, unnecessary and uncertain doctrine of the thalweg will be entirely eliminated for two reasons: In settling boundaries between States the court must apply international law, which rejects the doctrine of the thalweg, in this case, first, because, *as a general rule*, it can not annul and set aside the *special rule* which the common sovereign of both States has laid down as to the boundary in question; second, because the waters to which Complainant is striving to apply the doctrine are not territorial waters, international law recognizing its application only to waters of that character. The court should therefore entirely reject this abstraction, invoked for a dangerous and unlawful purpose, and settle the boundaries of Louisiana by a construction of the act of

Congress upon which her prior rights alone depend, an act whose clear, scientific and comprehensive terms only become difficult of application when the attempt is made to change them by the interpolation of an unsettled international rule in direct conflict with them. We say in direct conflict with them because the eastern boundary of Louisiana is fixed by the special terms of the act of 1812 in one place, while by the mid-channel theory it is fixed in quite another. The moment the Court resolves entirely to reject this mid-channel theory as inapplicable, that moment it will clear the ground for a simple solution of the real questions involved in the case, and at the same time break the back of the audacious attempt now being made to inclose *upon the medieval plan* 1,400 square miles of open sea, beyond the national limits, as a private preserve for the exclusive use of a giant trust or monopoly.

IV.

BOUNDARIES OF LOUISIANA AS DEFINED BY THE ACT OF APRIL 6TH, 1812.

If the Court concludes to reject the thalweg theory as inapplicable to this case we will pass at once beyond the conflicting theories of publicists as to an unsettled international rule to the firm and settled ground of statute law. Is it likely that Congress in enacting the law of 1812 intended to make the definition of the eastern boundary of Louisiana depend, not upon the terms of the statute, but upon an unsettled rule of international law more in dispute then than now. If Congress intended that the terms of the acts admitting the States in question should govern, the Court has only to deal with two technical

terms, "coast" and "shore," which are, by an array of unassailable authority, declared to be synonymous. In the act admitting Louisiana the word "coast" is used; in the acts admitting Mississippi and Alabama the word "shore" is used. We repeat the authorities cited on pp. 26-30 of our original brief, which demonstrate that "coast" and "shore" are convertible technical terms and as such entirely synonymous. It is settled that "*In a statute which requires measurement from the coast* the coast is the point of contact of the *mainland* with the sea; and when a bay intervenes the point of contact of *the bay with the mainland* is to be considered the coast." Farnham on Waters and Water Rights, Vol. II, p. 1463, citing *Hamilton v. Manieff*, 11 Texas, 718. In our humble judgment there are but two pertinent and legitimate inquiries to be made in this case: (1) What is the point of contact of the mainland of Louisiana with the sea, on the east, and what islands are within *nine miles* of that point of contact; (2) What is the point of contact of the mainland of Mississippi with the sea, on the south, and what islands are within *eighteen miles* of that point of contact. If there is a conflict the terms of the grant to Louisiana must first be satisfied, the remainder of the islands passing to Mississippi under the subsequent grant. By our relinquishment of the *in pari materia* doctrine all claim to the entire territory in dispute is given up. The only contention now is that the islands outside of the nine-mile limit measured from *the true mainland* of Louisiana belong to Mississippi under the terms of the act of 1817. Our earnest prayer is that the Court will listen to us with patience, and with its mental sensibilities

unruffled, while we attempt to demonstrate, with the greatest possible respect, that it has made a grave mistake in determining what is the point of contact of the real mainland of Louisiana with the sea. In other words that the Court has erroneously held that a certain archipelago of islands off the east coast of the peninsula of St. Bernard is a part of the mainland of that peninsula. Certain it is that Louisiana has a mainland coast in the usual acceptance of that term. Her bill is framed upon the theory that, if the mid-channel doctrine fails, she may recover the islands within nine miles of her eastern mainland coast. Her alternative case is this: "But if your honors should feel that any part of this disputed area *was islands* by reason of the presence of shallow water, then *as islands* they are within the nine-mile limit of distance from the shore line of the State of Louisiana and therefore belong to and form a part of the State of Louisiana by that second provision of the act of Congress giving Louisiana *all islands within three leagues of its shore line.*" Whether or no a certain piece of land is an island *is a legal conclusion* which should be drawn through the scientific application of certain recognized rules to a given condition of fact. Physical geography as a science has certain rules by which it determines whether or no a given piece of land is an island; the law as a science has certain rules by which it determines whether or no a given piece of land is an island. When the separate application of each set of rules to the facts of a given case results in the conclusion that the piece of land in question is an island, why should there be further controversy?

Let us first apply to the facts of this case which, in this regard, are not seriously disputed by either side, the rules of physical geography, beginning with the trite definition of an island as "a tract of land surrounded by water." After the geographer has gathered his data, he expresses his conclusion upon the face of his map whether or no a given piece of land is an island or mainland. The testimony shows that no maps of this region, worthy of the name, were ever made until the necessary data was first gathered by our Coast and Geodetic Survey. Nearly all of the early maps indicating the archipelago of islands in question as mainland declare upon their faces that the region was then unexplored; that there was then no data available from which the cartographer could determine whether the region was occupied by islands or not. Not until our Coast Survey explored the region and gathered the necessary data were any maps ever made which are of any value as to the point in question here. The fact should certainly be persuasive, if not convincing, that every map, every chart ever issued by our Coast Survey, clearly describes the archipelago of islands in question as such; and the same may be said of every other map of the region, with anything like complete details, issued since the materials gathered by the Coast Survey have been available. Such maps may differ in assigning the islands to one State or the other, *but upon all the islands are described as such.* When Mr. Baylor, the Coast Survey expert, who has devoted much time to a survey of this region, was asked whether, according to the standards of physical geography, the area in question was occupied by islands,

he answered yes, adding, "*They are certainly bodies of land around which vessels of moderate draft can sail.*" What kind of testimony could be more conclusive on this point than that of an experienced civil engineer and map maker who says he surveyed the entire coast "by trigonometrical methods." From another branch of the Federal Government whose duty it became to examine the region in question in order to ascertain, among other things, its geography, the expert testimony is equally explicit and convincing. In 1898 the General Assembly of Louisiana, by a concurrent resolution, requested the United States Fish Commission to make a careful exploration of the entire oyster region and industry, in order that an exhaustive report might be made upon the subject. With that end in view an expedition was sent out in the *Fish Hawk* composed of scientific men whose report was drawn by Dr. H. F. Moore, as printed in the record. See Vol. II, pp. 2033-2054. A survey of the territory was a part of the work because Dr. Moore says: "Contrary to expectations, it was found that the topography in general had not undergone many important changes since the survey upon which the Coast Survey charts were based, and the several points could be identified and located with sufficient accuracy to suit the purposes of *the reconnaissance.*" After that had been completed the report was made which begins with a "General description of the region." Upon that subject its words are: "*The land constitutes a low-lying archipelago of irregular islands separated from one another by shallow bays, muddy lagoons, and tortuous bayous, the area of the water being somewhat greater than that of the land. The bayous are of two classes, rather broad, short, deep passes, like*

Nine-mile Bayou, Three-mile Bayou, and Deep pass, which serve as the main avenues of tidal flow to and from the interior bays, and long narrow water courses which characteristically run lengthwise of the islands, as is seen in the cases of Door Point Bayou, Dead Man Bayou, etc. The bayous of the first class have generally a depth of from 18 to 42 feet, those of the second class from 5 to 12 feet, and all are more or less obstructed by bars across their mouths." Here we have the concurrence of two expert geographers, representing different branches of the Government, who, after minute surveys of the region by scientific methods, conclude that what we call islands are such in the full geographical sense. In making his report Dr. Moore expressly declares that "The land constitutes a low-lying archipelago of irregular islands separated from one another by shallow bays, muddy lagoons and tortuous bays, the area of the water being somewhat greater than the land." Fortifying and confirming this expert testimony from scientific men is the immemorial voice of the people of the community who for generations have been navigating the waters of this archipelago by sail and steam. Is it likely that the inhabitants of the region have been deceived while sailing and steaming around bodies of land surrounded by water which they have named Isle à Pitre, Petit Pass Island, Crooked Island, Mud-cross Island, Pirate Point Island, Nigger Island, Dead Man's Island, Shell Island, Brush Island, Mink Island, Wild Goose Island, Elephant Point Island, Sundown Island, Door Point Island, Martin Island and Mitchell Islands. Through these names, each one of which embodies a local tradition, the people of the com-

munity have been declaring to the world for generations that the islands in question which they have named as such, circumnavigated as such, are indeed islands. The bed-rock of English law is the voice of the local community; it is that and only that the jury system embodies. Why should the Court be inclined to set it aside in this case, confirmed as it is by the uncontradicted testimony of the experts who have so carefully explored the topography of the region.

Let us next apply the more exact and technical standards by which the law determines whether or no a piece of land surrounded by water is an island. From that standpoint the land must be of a particular character; a submerged fen, a body of land continually covered by water is not an island. The authorities heretofore cited (original brief, pp. 43-44), prove however that an island does not lose its character as such, although "at high tide it is almost covered by water," neither does it lose its character through erosion or submergence. That the lands composing the islands in question are firm lands standing at all seasons above water, upon which a traveler can at all seasons walk dry shod, is put beyond controversy by Complainant's own witnesses, Monier and Thiel, who were sent on a special mission to ascertain the facts in this regard. Monier says that he had no difficulty in walking along the shores of these islands; that "the shore line was hard," and high above the water. When asked, "About how much above water was the shore line?" he answered, "About a foot and a half to two feet." When asked, "Could you have driven a buggy to any part of that shore line?" he answered, "Yes, sir." When asked, "Do you undertake to tell the commissioner

that that sort of a trip could be made at any time during the year?" he answered, "Yes, sir. Q. And that there is no difficulty about it all? A. No, sir; there is not." Thiel, the companion of Monier, who confirms him in every particular, when asked "was that a trembling prairie?" answered, "No, sir; it was perfectly solid, there was no trembling prairie about that." Thus it appears from the uncontradicted testimony of complainant's own witnesses that the firm character of the land composing these islands, and its elevation above the water at all seasons, satisfy every legal requirement in that regard. As to the character of the water surrounding these islands it may be said that the law requires that a strip, it may be a very narrow strip, of *navigable water*, must separate an island from the mainland. An island must be surrounded not only by water but by navigable water. "All tide water is *prima facie* public and navigable, the burden is on the person alleging the contrary." Farnham on Waters, Vol. I, p. 125, citing *Sullivan v. Spotswood*, 82 Ala. 163. While there is no negative proof that the tide waters in question are not navigable, there is affirmative proof that the waters surrounding these islands are easily navigable for a steamer drawing four feet. See original brief, p. 55. According to the report of the Fish Commission "the depth of water is generally from 3 to 6 feet although in some of the bays, particularly those to the eastward, there are channels through which a considerably greater depth can be carried." Thus it appears that when the character of the islands in question is tested not only by the standards of physical geography but by the more exacting rules of strict law they are found to be such in the full

legal as well as geographical sense. No importance can be attached to the fact that the material composing the islands is alluvium, and that they were formed as a part of the same general geological process by which the mainland was formed. It can not be said that what the Fish Commission calls "a low-lying archipelago of irregular islands" is not such because its geological origin is the same as that of the mainland. Certainly from the standpoint of physical geography that position is entirely untenable. In the classification of land forms it is a fundamental principle with geographers to determine the character of an island solely by reference to its form, regardless of its geological origin. Such is the conclusion of the highest authority perhaps, on the subject. "From the geographical point of view land forms are best considered, in their larger aspects at least, from the point of view of form alone *without reference to their geological history.*" The International Geography, p. 62. When the matter is tested by legal standards it is difficult to understand how the geological origin of an island can be material, as the law deals with the form alone. For instance the archipelago of islands lying off the coast of Alaska represents, as the geologists tell us, the result of the disintegration of the mainland through glacial action. Will any one contend that that fact makes them any less islands in the geographical and legal sense of that term? But if the geological origin of the islands is to be taken into account the Court should certainly give due weight to the testimony of Complainant's witnesses, Stubbs and Harrod, both of whom admit that they were *formed as islands* in the waters of a shallow sea; that they were not cut off

from the mainland. Against the irresistible conclusion that the islands in question are such,—a conclusion supported by all the tests which the rules of law, of geography, of geology recognize,—the Court in its opinion has opposed this, *and only this*: “Certainly there are in the body of the Louisiana marches or St. Bernard peninsula portions of sea marsh which might technically be called islands, because they are land entirely surrounded by water, *but they are not true islands*. They are rather, as the Commissioner of the General Land Office wrote the Mississippi Land Commissioner in 1904, ‘in fact, hummocks of land surrounded by the marsh and swamp in said township’” (p. 22). There is nothing to show that this Land Commissioner ever saw the region in question, and if his description of it was ever intended to apply to the “low-lying archipelago of irregular islands” surveyed and mapped by the Fish Commission, it is simply a caricature in conflict with all the evidence in the record. Contrast for instance his description of the soil with that given by *Complainant's witnesses*, Monier and Thiel, who swear that it stands “about a foot and a half to two feet” above the water, and that it is possible to drive a buggy on any part of the shore line at any season of the year. Then contrast his statement as to “hummocks of land *surrounded by the marsh and swamp*,” with the uncontested fact, of which the Court has judicial knowledge, that the pieces of land in question are *surrounded by navigable tide water from $\frac{1}{4}$ to $2\frac{1}{2}$ feet in depth*. But why should there be controversy as to the character of these islands when “Louisiana admits that there are some islands in the disputed area, *namely Grassy, Half Moon or Grand, Le Petit pass, an unnamed island and Isle à*

Pitre, all of which are between the deep-water channel on the north and the main coast line of the St. Bernard peninsula on the south; and contends that *these islands* were previously given to her, Louisiana, by the act of Congress creating her a State, April 6, 1812, nearly six years prior to Mississippi's creation as a State, and that her title thereto is better than that of the State of Mississippi." See Louisiana's original brief, making this admission, at p. 140. If Isle à Pitre and Petit Pass islands are such, *in the true legal sense*, as Complainant's counsel, with an intimate personal knowledge of them, declare them to be, we respectfully ask upon what basis can the Court declare that "they are not true islands." If the islands named are such, then the remainder are, as the proof is that they are all identical in character. Complainant's counsel admit and claim that Isle à Pitre, Petit Pass Island, Grassy Island and Grand Island *were regarded by Congress as true islands and conveyed as such to Louisiana*. We have demonstrated that they are true islands by every test which the law of the land recognizes. The conclusion of law thus involved in the character of the islands is the most vital question in Mississippi's case. We therefore respectfully invoke for her the right to have that vital question settled by the application of the only rules which the law of the land recognizes. Only in that way can she be guaranteed due process of law in the plainest sense of that term. We earnestly pray to be reheard on this branch of case.

There is, however, another reason more potent still why the Court should accept the fact that the islands in question are such in the legal sense. *They have been declared to be such by the Congress of the United States*. The rule is elementary

that "Statutes are to be interpreted so as to give effect to all the words therein. * * * It is not to be presumed that the legislature intended that any part of a statute should be *without its proper meaning, force or effect.*" Potter's Dwarrris on Stat. and Const. p. 188, note 8. It is not to be presumed that Congress attempted to grant to Mississippi "all islands within six leagues of the shore to the most southern junction of Pearl River with Lake Borgne," *if there are no islands within that zone upon which the grant can operate.* The Court must find, if it can, a subject-matter upon which the grant can operate. The whole problem is solved, so far as a subject-matter is concerned, the moment the Court accepts the "low-lying archipelago of irregular islands" as such because they are in exactly the right place, almost exactly opposite the junction of Pearl River with Lake Borgne. That Congress regarded these islands as such and attempted to grant them as such to Mississippi has been frankly admitted by counsel for Complainant in their original brief, p. 65. In explaining the circumstances attending the drafting of the act of 1817 they say: "This calls attention to the error, if error it be, of Congress, and the oversight consists not 'in framing the respective acts' for the admission of the two States, but in the drafting of the Mississippi act, more than five years after the Louisiana act, and embracing in the Mississippi act, *islands which had already been granted to Louisiana.*" Here is a *second* admission that Congress regarded these islands as such, and attempted to grant them as such to Mississippi. Because that view is so plain the alternative prayer of the bill is that, in the event the mid-channel theory fails, the Court will confirm to Louisiana the islands

within three leagues of her eastern shore line. Her counsel correctly state that the only mistake made by Congress was in attempting to give to Mississippi islands which had been previously granted to Louisiana. *If that be true then Congress certainly dealt with the islands as such.* In that event the Court will hold that all such islands as are within nine miles of the eastern mainland coast of Louisiana passed to her under her prior grant, while the remainder east of that limit should pass to Mississippi as Congress intended. If the Court shall recognize the archipelago of islands as such there can be no difficulty as to what is the eastern mainland coast of Louisiana, because the Coast Survey expert, W. C. Hodgkins, one of Complainant's most trusted witnesses, has traced the eastern mainland coast line of Louisiana in substantial accord with the red line indicating the same on map No. 59 submitted with our original brief. We earnestly suggest that the highest principles of equity should prompt the Court to reach the conclusion just indicated, as the islands that would thus pass to Mississippi *are of the greatest value to her because they lie at her very threshold, directly across her narrow sea front, while they are comparatively valueless to Louisiana, because so far removed from her centres of population as to be almost entirely severed from the main body of the State.* In *Knoultton v. Moore*, 178 U. S. p. 77, this Court has said: "That, where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute." In *Handly v. Anthony*, 5 Wheat. 374, this Court speaking through Marshall, C. J., has said: "In great questions

which concern the boundaries of States, where great natural boundaries are established in general terms, *with a view to public convenience, and the avoidance of controversy*, we think *the great object*, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals." Under that large enunciation the Court has the right and it is its duty to shape its judgment in such a case "with a view to public convenience and the avoidance of controversy," after it has ascertained "*the great object*" to be attained. Will any one deny that the great object to be attained was such a just and equitable distribution of the Gulf coast line between these States as would give to each a fair and convenient proportion of it? Can the Court lose sight of the fact that of that coast line Louisiana possesses about 623 statute miles while Mississippi possesses only about 71? And here we respectfully suggest that it is neither reasonable nor logical for the Court to assume that Congress had no intention of diminishing that inequality when it gave to Mississippi "all islands within *six* leagues of the shore to the most southern junction of Pearl River with Lake Borgne," instead of within *three* leagues. It can not be assumed that Congress spoke without thought, or that it did vain and meaningless things, or that it had no understanding as to future conditions. Why should the Court be inclined to believe that Congress intended in this case to grant to Louisiana islands lying across the sea front of Mississippi when the map of the Union, of which the Court has judicial knowledge, proves to it *that no such injustice has ever been done in the case of any other*

State? If the Court, in the light of these high considerations of equality which is equity, would recognize the "low-lying archipelago of irregular islands" to be what all modern cartographers declare them to be, and would then confirm all that lie within nine miles of the true mainland coast of Louisiana to that State and the remainder to Mississippi, it could erect upon the boundary ever to divide these States a monument to that kind of large-minded justice which ever imparts moral dignity to the exercise of supreme authority. Thus bitter strife would be hushed and a genuine and cordial understanding reestablished through such a construction of the acts of 1812 and 1817 as would give to each a subject-matter upon which all of their respective provisions could operate. Will not the possibility of attaining such a result induce the Court to rehear us, however briefly, *upon the particular questions indicated herein?*

We, the undersigned members of the bar of this Court, humbly conceive that by reason of the matters herein indicated, it is proper that this cause should be reheard by this Court if it shall see fit so to order, and they therefore respectfully certify accordingly.

HANNIS TAYLOR,

WILLIAM WILLIAMS,

MONROE MCCLURG,

Attorney-General of Mississippi.

Of Counsel.

